IN THE HIGH COURT OF JUDICATURE AT BOMBAY

APPELLATE SIDE

FIRST APPEAL NO. 45 OF 2005

BHANUMATI JAGMOHANDAS SHAH ... APPELLANT

Versus

MUNICIPAL CORPORATION OF GR.BOMBAY .. RESPONDENTS

Mr. Bharat Joshi for appellant

Mr. J. Xavier for BMC

CORAM:-SMT. RANJANA DESAI, J.

DATED:-15-2-2005

ORAL JUDGMENT:

Original plaintiff in B.C.C. Suit No. 796 of 1997 has challenged in this appeal, judgment and decree dated 27/10/2004 passed by the City Civil Court Mumbai whereby the plaintiff's suit against the defendant Corporation was dismissed. In this judgment I have referred to the parties as per their their status in the trial court.

2. The suit was filed by the plaintiff for a declaration that the order dated

24/12/1996 issued by the DMC Zone-I and notice dated 6//11/1996 issued by the defendant are illegal, malafide, perverse, unilateral and deserve to be set aside. In short the case of the plaintiff is that the plaintiff is in exclusive use, occupation and possession of office premises bearing No. 1 on ground floor, Riddhi Siddi Bhavan, 2/12 Babu Genu Street, Mumbai, admeasuring 130 sq. ft. and a loft of about 55 sq. ft. ("the suit premises" for short). The plaintiff purchased the suit premises under an agreement dated 20th May, 1994 from one Gopikrishnan Umaram Purohit. The plaintiff's son is carrying on business in the suit premises. According to the plaintiff the said Purohit purchased the suit premises from one R. K. Bagla under an agreement dated 18/6/82. The said Purohit filed a suit being Suit No. 3349 of 1994 in the City Civil Court at Bombay challenging the notice dated 9/10/96 issued by the defendant under Section 351 of the B.M.C. Act in respect of the suit premises. It was the case of Purohit that the said notice was not served upon him. The said suit came to be withdrawn by Purohit on 27/11/96 when a copy of the suit notice was handedover to him and a statement was made by the counsel for the defendant that due process of law will be followed.

3. According to the plaintiff on 27/11/96 impugned notice under Section 351 of the B.M.C. Act was served on him. The said notice alleges that the suit premises are unauthorised. The plaintiff's case is that as per the averments

made by Purohit in the plaint in the suit filed by him, the suit premises are a garage and the sanctioned plan thereof is with Mr. Bagla who is absconding and not traceable. The defendant ought to have called for record of the suit building and sanctioned plan for verification. The plaintiff by her advocate's letter dated 20/12/96 replied to the suit notice. The D.M.C. Zone-I by his order dated 24/12/1996 held that the plaintiff had failed to prove the authorisation of the suit premises. Hence direction was given to remove the unauthorised structure. According to the plaintiff the D.M.C.'s notice is without application of mind. The said notice and the said order are challenged in the instant suit as being bad in law, malafide and issued without looking to the evidence on record.

4. The defendant resisted the suit by filing written statement. According to the defendant on receipt of complaint on 17/10/96 from one Mr. P. K. Kapadia, the site was inspected on 23/10/96 and 24/10/96 and the unauthorized construction was detected. A report was prepared and thereafter the suit notice was issued. Suit No. 3349 of 1994 filed by Mr. Purohit was withdrawn on 27/11/96. A statement was made that due process of law would be followed. The defendant, therefore, pursued the suit notice. But before the defendant could take any action, the plaintiff filed the suit. According to the defendant the plaintiff has failed to produce documentary evidence proving the authorisation of the structure.

5. In support of her case son of the plaintiff who is also the constituted attorney of the plaintiff filed his affidavit in examination-in-chief. The defendant examined two witnesses being D.W. 1 Shri Mohan Laxman Ved and D.W. 2 Shri Prakash Ganpat Mohite. Aftger perusing the evidence the trial court held that the plaintiff had failed to prove that the plaintiff is entitled for declaration that the suit notice and order are illegal, malafide and deserve to be set aside and that the plaintiff had failed to prove that the defendants are not entitled to issue and pursue the suit notice in the light of the earlier notice under Section 351 of the B. M. C. Act in respect of the suit premises which was challenged in B.C.C. Suit No. 3449 of 1994. In the circumstances, the trial court dismissed the suit, hence this First Appeal.

6. I have heard at considerable length Mr. Joshi, the learned counsel appearing for the appellant. With the help of the learned counsel I have gone through the record.

7.Mr. Joshi contended that the suit filed by Purohit challenging the earlier notice dated 9/10/86 was withdrawn. The notice dated 9/10/86 was not acted upon and, therefore, it must be presumed that it was dropped. The learned counsel contended that in the plaint of the instant suit the plaintiff has categorically referred to the plaint in earlier suit No. 3349/94 filed by Purohit challenging the notice dated 9/10/86. In that plaint Purohit has referred to a

receipt dated 2/12/82 for the sum of Rs.5,000/- which the original owner Bagla had paid to the Corporation towards the faithful compliance of U T locked up garage. The said amount was accepted for regularisation of the suit premises. Bagla had been using the suit premises thereafter. The learned counsel urged that it was, therefore, necessary for the defendant to find out as to whether by accepting the sum of Rs.5,000/- the suit premises are in fact regularised. No such inquiry seems to have been made by the defendant and, therefore, the action initiated by the defendant is malafide. The learned counsel urged that even the trial court has wrongly placed burden on the plaintiff inasmuch as the receipt dated 2/12/82 being in the possession of the defendant it was obligatory on the defendant to satisfy the court that this receipt did not pertain to regularisation of the suit premises. In fact in the plaint of Purohit to which specific referennce is made in the plaint of the instant suit by the plaintiff, Purohit has categorically averred that Bagla the original owner had informed him that the sanctioned plan in respect of the suit premises was in existence. Therefore, it was obligatory on the part of the defendant to inform the court whether in fact the suit premises were regularised and sanctioned plans were in fact in existence.

8.The learned counsel further urged that the order passed by the D.M.C. also suffers from non-application of mind inasmuch as the D.M.C. has failed to consider the relevant points. The D.M.C has observed that the suit structure

was not in existence in 1962. This was in fact not in issue at all. The learned counsel further urged that the D.M.C. has not considered the second reply sent by the plaintiff dated 20/12/1996. There is intrinsic evidence to show that the said reply was not at all placed before the DMC. This reply contained the plaintiff's case. To this reply was annexed a copy of the receipt dated 2/12/1982 on which the plaintiff's case rests. That reply has not received the consideration of the D.M.C. at all.

9.The learned counsel urged that the evidence of defence witnesses and particularly defence witness No. 1 has been severely commented upon by the trial court as not being satisfactory and, therefore, it was wrong on the part of the trial court to hold that the suit notice and the suit order are legal. He, therefore, submitted that the impugned judgment and decree deserves to be set aside.

10.As against this Mr. Xavier, learned advocate for the respondent Corporation contended that the plaaintiff's suit is rightly dismissed. He submitted that no cogent or credible evidence is led by the plaintiff to establish that the suit premises were regularised. The learned counsel urged that it is difficult to connect the receipt dated 2/12/82 to the suit premises. It cannot be said that a sum of Rs.5,000/- was taken from the previous owner Bagla and the suit premises were regularised. The plaintiff has failed to establish this fact. The learned counsel submitted that the trial court has

rightly held that it was for the plaintiff to call upon the defendant to produce the relevant documents which the plaintiff has failed to do. The plaint does not contain a categorical assertion that the suit premises were regularised. The reply dated 20/12/1996 on which the appellant is heavily relying also had no reference to the receipt dated 2/12/1982. He, therefore, submitted that the suit is rightly dismissed.

11.A few relevant dates will have to be noted before I begin with the analysis of the evidence. According to the appellant on 2/12/82 original owner Bagla paid Rs.5,000/- towards faithful compliance of proposed locked up garage. On 18/6/1982, under an agreement Shri Purohit purchased suit premises from Bagla. On 9/10/86 notice under section 351 of the B.M.C. Act was issued to Bagla and on 20/5/94 the plaintiff purchased the suit premises from Purohit under an agreement. On 31/5/94 Purohit filed Suit No. 3349 of 94 challenging notice dated 9/10/86. It is surprising to note that though prior to the filing of the suit, the suit premises were sold to the plaintiff, Purohit did not disclose this fact to the court. Purohit did not implead the plaintiff in the suit. Only Bagla was impleaded as party defendant. Purohit contested the suit upto 1996. It is inconceivable that the plaintiff would not know about the pendency of the suit or that he would not try to get particulars about the suit premises from Purohit.

12.It is also significant to note that in the suit filed by Purohit challenging

notice dated 9/10/86, Purohit has made grievance that the notice was not addressed to the occupier; that copy was not served on Purohit; that suit premises were old; that defendant 2 i.e. Bagla had purposely not sent a reply and that the notice was issued at the instigation of defendant 2. There is no averment in the plaint that the suit premises were regularised. It is only stated that Bagla represented to Purohit that he had deposited Rs.5,000/- but there is no categorical assertion that Bagla told him that by paying Rs.5,000/- the suit premises were got regularised nor has Purohit stated that because Bagla had paid Rs.5,000/- the suit premises were regularised. In fact in paragraph 6 of the plaint, Purohit has stated that he came to know that the said construction was made by defendant 2 unauthorisedly. Therefore, Purohit in the plaint admits the unauthorised nature of the suit premises.

13. After the suit notice was served on the plaintiff, he sent his first reply dated 12/12/96. In that reply he merely asked for time. He sent his second reply on 20/12/96 which was served on the defendant on 21/12/96. In the first reply there is no reference to the payment allegedly made by Bagla to the defendant and the receipt dated 2/12/82 but even in the second reply which is a detailed reply and for which time was sought in the earlier letter dated 12/12/1996, there is no reference to the said payment and to the said receipt. Only xerox copy of the said receipt is

annexed to the second reply. If it is the plaintiff's case that by reason of the said payment the suit premises were regularised, he should have put that case in forefront in his reply. He has not done so.

14. It is also significant to note that in the plaint of the instant suit, there is no reference to the said payment or receipt. There is only a reference to the suit filed by Purohit.

15. Mr. Joshi, learned counsel appearing for the appellant pointed out to me that the plaint in the suit filed by Purohit was relied upon by the plaintiff and it was produced in the court. If that is so it is surprising as to how plaintiff does not directly refer to the said payment of Rs.5,000/- or the said receipt dated 2/12/1982 when that is the main plank of his case. He does not take up a categorical contention that by reason of the payment made under this receipt the suit premises are regularised. It is only in the affidavit of examination-in-chief and in the case put up to the defendant witnesses that this case is suggested. That makes the entire story about this deposit suspect. Nothing prevented the plaintiff from taking a categorical stand that on account of this alleged payment, the suit premises were regularised. The plaintiff has not come to the court with this case. It is evident that the plaintiff is not sure about his case and a case was sought to be built up in the court.

16. It was argued by Mr. Joshi that the earlier notice dated 9/10/86 was

dropped. That does not appear to be so. That notice was issued to Bagla. The suit was filed by Purohit on apprehension. A copy of the notice was given to Purohit. Statement was made that due process of law would be followed and hence suit was withdrawn. As a step in following the due process of law the second notice dated 6/11/96 appears to have been pursued. There was then no question of pursuing the notice issued to Bagla. This submission of Mr. Joshi must, therefore, fail.

17. Sofar as receipt dated 2/12/82 is concerned, its xerox copy is on record. I have perused it. From this xerox copy it cannot be definitely said that it pertains to the suit premises and that the money was accepted for its regularisation and that the suit premises were regularized. The trial court is right in coming to the conclusion that on the basis of this receipt, the plaintiff's claim could not have been accepted.

18. It was argued by Mr. Joshi that the defendants have not led any cogent evidence. In fact the trial court has severely commented upon the nature of evidence led by the defendant and, therefore, the trial court could not have dismissed the plaintiff's suit. I am not impressed by this submission. Barring a xerox copy of the receipt, the plaintiff has not produced any evidence on record in support of her stand that the suit premises were regularized and hence the notice was wrongly sent. It is not clearly stated in the plaint when the suit premises were constructed. It is not stated as to

when alleged regularisation was done and what procedure was followed. There is no reference to the deposit receipt dated 2/12/82 in the plaint. The plaintiff has sought to rely on the plaint filed by Purohit but in that plaint itself Purohit has stated that the suit premises are unauthorised. Purohit in his turn has sought to rely on a statement made by Bagla that the suit premises were regularized and there was a sanctioned plan. It is stated by the plaintiff that the said Bagla is absconding and is not traceable. Therefore, there is no credible and cogent evidence forthcoming in support of the plaintiff's case. While the defendant is relying on Purohit's suit, Purohit is in turn relying on Bagla having paid some money to the defendant and that Bagla having told him that there were sanctioned plans but no evidence has been produced in the court. The court cannot draw inference from the above circumstances and come to a conclusion that the suit premises were regularized. The suit premises appear to be in compulsory open space of the building and as per the evidence of DW 2 they were not assessed.

19. It is true that the trial court has noted that the evidence of the defence witness is not totally supporting the defendants but this is a case where in my opinion, the plaintiff herself has not discharged the burden which was resting on her.

20. Having perused the evidence on record and having gone through the

pleadings I am of the opinion that on the basis of the plaint as it is framed and the evidence which the plaintiff has adduced, the plaintiff has not made out even a prima facie case that the suit premises were regularized. In view of this the trial court cannot be faulted for having dismissed the suit.

21. There is, however one aspect of the case which needs to be mentioned. Notice dated 6//11/96 was served on the plaintiff on 27/11/96. The notice was to be replied within fifteen days. The plaintiff sent his reply on 12/12/96 and asked for time. Inspection report was submitted by D.W. 1 on 18/12/96 to D.M.C. From the record it appears that D.M.C. passed his order on 18/12/96 and it was issued on 24/12/96. Therefore, in the nature of things this second reply of the plaintiff dated 21/12/96 could not have been considered by him. This seems to be an admitted position. It is true that there is no reference to the receipt dated 2/12/82 in the body of this reply but a xerox copy thereof was annexed to this reply. It was strenuously contended before me that this reply was not sent within the stipulated time and hence was not considered by the D.M.C. The very base of the appellant's case appears to be the receipt dated 2/12/82 under which a sum of Rs.5,000/- was allegedly taken and the suit premises were regularised. It was contended by Mr. Joshi that the D.M.C. has not considered this reply to find out whether the said receipt pertains to the

suit premises and whether the suit premises were at all regularized. It appears that the learned Judge refused to refer the matter to D.M.C. and decided to go into the evidence to find out whether the suit premises were regularized and found that there is no evidence to come to the conclusion that the suit premises were regularised. I have already stated that on the basis of the plaint as it is framed and the evidence which was before him the learned Judge was right in coming to that conclusion. I have affirmed his view. But since the second reply of the plaintiff was admittedly not considered by the D. M. C. I feel that in the interest of justice if the plaintiff approaches the D. M. C. the D. M. C. may only examine whether the said receipt in fact pertains to the suit premises or whether on account of the payment made therein the suit premises were regularised. This may be considered independently without being influenced by the observations made by the trial court or made by me in this judgment within a period of three months from the date of application, if any made by the plaintiff.

22. With the above observation the appeal is dismissed.

23. Mr. Xavier, the learned counsel for the Corporation says that powers to issue notice under Section 351 of the M. M. C. Act have now been delegated to the Asstt. Mun. Commissioner of the concerned Ward. Hence if the plaintiff makes an application to the Asstt. Mun. Commissioner of the concerned ward, he shall consider it within three

months from today. Hence the following order:-

> "Appeal is dismissed. If the plaintiff approaches Asstt. Mun. Commissioner C-Ward, he shall consider whether an amount of Rs.5,000/- was accepted by the defendant corporation under receipt dated 2/12/82 and the suit structure was regularized or not. The plaintiff shall make this application within four weeks from the receipt of this order and Asstt. Mun. Commissioner C-Ward shall consider it within a period of three months from the date of receipt thereof by him. It is clarified that the application shall pertain only to the receipt dated 2/11/1982. The scope of the application is limited and shall in no event be widened. If it is widened the Asst. Mun. Commissioner shall not consider it. The object of this direction is not to start another round of litigation.
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> Needless to say that till such time as the Asstt. Mun. Commissioner considers the application and passes the order and for two weeks after communication thereof to the petitioner, the Corporation shall not demolish the suit structure.
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> Needless to say that all civil applications also stand disposed of. Record be sent back immediately.
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> Office of the City Civil Court, Mumbai to issue certified copies of the exhibits expeditiously on the application of the appellant, on

payment of necessary charges.

Corporation to act on authenticated copy of this order.

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